

Conversely, respondent and its insurance carrier argue the Order should be affirmed. They argue claimant failed to prove she provided respondent with timely notice of her accident or right shoulder injury. They first contend claimant failed to prove she sustained a repetitive trauma injury and, therefore, her last day of working for respondent should not be designated as the date of accident. Accordingly, they contend claimant

failed to prove she provided notice of her injury within 10 days of the date of accident. Moreover, they argue claimant failed to prove what day she was injured and, therefore, failed to prove that she provided notice within 75 days of that date assuming there was just cause that extended the notice period. Finally, respondent and its insurance carrier also dispute just cause existed to extend the notice period under K.S.A. 44-520.

The issues before the Board on this appeal are:

1. What is the appropriate date of accident?
2. Did claimant provide respondent with timely notice of her accident or right shoulder injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked in respondent's kitchen making donuts, breakfast sandwiches, and lunch items. Although claimant is not certain of the day or month, she believes that in either January or February 2006 she was moving boxes in respondent's freezer and her right shoulder gave out. Claimant testified she did not experience any pain at the time and did not think anything of the incident. Instead, claimant merely believed she was tired. Unfortunately, within a couple days of the incident, claimant began experiencing right shoulder pain.

Claimant did not initially report the incident or her right shoulder symptoms to respondent. But claimant continued to work and her pain progressively worsened. According to claimant, she worked for approximately a month before she told her manager, Shirley Kiefer, about her arm giving way and her worsening pain.

On March 28, 2006, claimant's husband telephoned Ms. Kiefer to advise that claimant would not be at work the next day as her shoulder was bothering her. The next day claimant telephoned the store and left a message that Ms. Kiefer needed to telephone the doctor's office to authorize medical treatment under workers compensation. According to Ms. Kiefer, March 29, 2006, was the date that claimant first advised she had injured her shoulder at work.

The record is not entirely clear but it appears March 28, 2006, was the last day claimant worked for respondent.

At her attorney's request, claimant saw Dr. Sergio Delgado in July 2006. Regarding the right shoulder, the doctor diagnosed impingement syndrome and a possible rotator cuff tear. The doctor's July 25, 2006, letter, which was presented at the preliminary hearing, does not indicate whether claimant's right shoulder injury occurred as the result of a single traumatic event, a series of traumas, or a combination of the two. In his letter, Dr. Delgado noted the following history regarding claimant's right shoulder complaints:

Some time *[sic]* in January of *[sic]* February of 2006, she [claimant] developed pain in the right shoulder which she relates also to lifting activities at work and for which she was treated with physical therapy and work restrictions. At that time, she was lifting a box of bread sticks which she weighed between 15-20#. She has been off work since March 31, 2006, because of the work restrictions imposed of no repetitive use of the right upper extremity and no heavy lifting.¹

Likewise, the July 5, 2006, medical report of Dr. Michael Geist does not indicate whether claimant's shoulder injury occurred as the result of a single event or a series of traumas. Indeed, Dr. Geist indicated that he had a difficult time relating claimant's shoulder symptoms to just moving boxes in a freezer. In his report, Dr. Geist wrote, in part:

She says [s]he works full time and her main job is a donut maker, which she mainly does in the morning, but then she does do lunch in the afternoons and runs a register some and also has to do she says some stocking and unloading. She states she started developing discomfort in her right shoulder sometime back she thinks in February of this year. She said the only thing she remembers is one day moving some boxes in the freezer and noticed some discomfort in the shoulder. She said over the next number of weeks it seemed to be getting worse and she ended up going to the emergency room in Ottawa.

. . . .

She complains of about four months now of right shoulder pain and weakness. She relates this to an incident at work, moving boxes in a freezer. Medically, I have a difficult time relating her symptoms and the duration of them to something that she describes as fairly minor, again just moving boxes in a freezer which is something she said she does on a regular basis.²

At this juncture, the record establishes that claimant has right shoulder symptoms and that on March 29, 2006, she notified respondent of injuring her shoulder at work. But the record fails to establish whether claimant's shoulder injury occurred as the result of a

¹ P.H. Trans., Cl. Ex. 1 at 2.

² *Id.*, Resp. Ex. A at 1, 2.

single traumatic event or a series of traumas. Consequently, the date of accident has not been established. In the event the injury occurred as the result of a single traumatic event, the date of that event has not been sufficiently identified to determine whether timely notice was provided to respondent regardless of whether just cause existed to extend the notice period to 75 days.

This Board Member affirms the Judge's conclusion that thus far claimant has failed to prove she provided timely notice of her injury or accident as required by K.S.A. 44-520. Consequently, the August 8, 2006, Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, this Board Member affirms the August 8, 2006, Order entered by Judge Hursh.

IT IS SO ORDERED.

Dated this ____ day of October, 2006.

BOARD MEMBER

c: Matthew R. Bergmann, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

³ K.S.A. 44-534a.